ARAB MALAYSIAN MERCHANT BANK BHD.

v.

CITY PROPERTIES SDN. BHD.

HIGH COURT MALAYA, KUALA LUMPUR
LIM BENG CHOON J
[CIVIL SUIT NO. S7-24-346-1990]
13 JUNE 1992

CIVIL PROCEDURE: *Rules of High Court 1980 - Originating summons application for an order of sale by plaintiff - Section 256(2), (3) National Land Code 1965 - Extraneous agreements and transactions involving plaintiffs, defendant and borrower raised - Application by defendant under O. 28 r. 8 RHC 1980 - Whether issues raised gave grounds for originating summons to be continued as if commenced by writ of summons.*

LAND LAW: *Sale of land - Order for - Where chargee exercised his rights pursuant to s. 256(2) and (3) of the National Land Code, the Court was encumbered to order the sale of lands charged unless there was cause to the contrary.*

EVIDENCE: *Whether cross-examination on an affidavit allowed on matters extraneous to the issues raised in the affidavit - Section 92 Evidence Act 1950 - Whether extrinsic evidence permissible for the construction of the words.*

On 1 March 1990, the plaintiff by way of an originating summons sought an order for sale to foreclose the lands (the disputed lands) that were charged to the plaintiffs by the defendant as security for a loan of six million ringgit advanced to one Dato' Yap ("the borrower").

The defendant had defaulted in the repayment of the loan and a Form 16D notice under the National Land Code was sent to the defendant which was not complied with.

The defendants in their affidavit claimed the following loans, which formed one single account, were advanced to the borrower:

(a) A foreign currency term loan of RM22,577,980 was disbursed in two separate sums, *viz*:

  (i) The loan of RM12,150,000, secured by a charge on property belonging to Laylian Realty Sdn. Bhd., to be used to buy-over the paid-up share capital of the defendant.

  (ii) The loan of RM10,427,980 in order to buy-over the paid-up share capital of Laylian Realty Sdn. Bhd.

(b) A ringgit term loan of RM6,000,000 secured by a 2nd legal charge over certain lands belonging to the defendant and the properties known as Lots 209 & 211 belonging to Laylian Realty Sdn. Bhd.

On 31 March 1987, the plaintiffs received RM33,250,000 as partial settlement of the borrowers' loan facilities.

The defendant claimed that:

(i) They had been misled into believing that the various loan facilities granted to the borrower were in respect of one single account and thus the plaintiff were estopped from denying the existence of the one single loan account.

(ii) The 1st legal charge created in respect of the foreign currency term loans was sham, unlawful and/or illegal as the plaintiff knew or ought to have known the term loan were used to purchase shares in the defendant company and Laylian Realty Sdn. Bhd., in contravention of s. 67 of the Companies Act 1965.

(iii) No consent was obtained from the defendant and/or Laylian Realty Sdn. Bhd., at an AGM which was contrary to s. 132C of Companies Act 1965. Therefore, the single loan account was voidable and was illegal and/or unenforceable.

(iv) The payment of RM33,250,000 was made towards partial settlement of the single loan.

(v) It would be inequitable to allow the plaintiffs to foreclose the defendant's lands as the plaintiff had already initiated foreclosure proceedings against Laylian Realty and the borrower.

The plaintiff contended that the issues raised by the defendant's affidavit were extraneous, and irrelevant and the matter should be considered solely by relying on the construction of the relevant documents. The attempt to question the legality of the charge so late in the day was unsustainable and an abuse of the process of the Court.

On 26 March 1991, the defendant by way of a summons-in-chambers applied for an order that the proceedings be construed as though commenced by writ of summons and sought to cross-examine the plaintiff's senior bank manager on the affidavits filed by him.

Held:

[1] Unless there is cause to the contrary, the Court was obliged to grant order for sale of the said land as the chargee of the disputed lands were merely exercising their rights under s. 256(2) and (3) of the National Land Code 1965. (*Kheng Soon Finance v. M.K. Retnam Holdings Sdn. Bhd.*)

[2] It is not appropriate for a Judge to resolve conflicts of evidence on affidavit, though he is not bound to accept the affidavit uncritically. (*Eng Mee Yong & Ors. v. Letchumanan.*)

[3] All obligations and liabilities, rights, powers and privileges of parties have been clearly stated in the annexure to the charge executed by the parties. As there were no ambiguities and uncertainties in the annexure, no extrinsic evidence can be adduced to construe the term of the annexure or to discover the parties' intention.

[4] Evidence from Form 16A and the charge annexure showed the ringgit term loan of six million was an independent loan transaction granted to Dato' Yap, governed only by the provisions of the instruments creating the charge and by the relevant loan agreements. Hence, the transaction had nothing to do with the foreign term loans except the fact both loans were given to the same Dato' Yap.

[5] No cross-examination on an affidavit should be allowed on matters extraneous to the issue in the particular proceedings in which the affidavit was filed. (*Re SBA Properties Ltd.*)

[6] If the defendant was serious about the legality of the charge, he ought to have raised the issue earlier. The attempt to raise so late in the day was a total abuse of the process of the Court.

[7] The cause of action and matter brought by the plaintiff was correct and the defendant *bona fides* in bringing an application by way of summon in chambers was questionable.

[Defendant's application by way of summons in chambers dismissed. Plaintiff's application for an originating summons to be heard on a date to be fixed by SAR.]

Cases referred to:

Kheng Soon Finance Bhd. v. M.K. Retnam Holdings Sdn. Bhd. & Ors. [1983] 2 MLJ 384 ***(foll)***
Eng Mee Yong & Ors. v. V. Letchumanam [1979] 2 MLJ 212 ***(foll)***
Wickman Tools v. Schuler AG [1974] AC 235 ***(foll)***
Faber Merlin (M) Sdn. Bhd. & Ors. v. Lye Thai Sang & Anor. [1975] 2 MLJ 380 ***(foll)***
United Malayan Banking Corp. Bhd. v. Tan Lian Keng & Ors. [1990] 1 MLJ 280 ***(foll)***
Re SBA Properties Ltd. [1967] 1 WLR 799 ***(foll)***

Legislation referred to:

Companies Act 1965, ss. 67, 132C
Evidence Act 1950, ss. 91, 92
National Land Code 1965, s. 256(2), (3)
Rules of the High Court 1980, O. 28 r. 8

For the plaintiffs - N. Chandran; M/s. Adnan Sundra & Low
For the defendant - Manjit Singh; M/s. Sri Ram & Co.

JUDGMENT

Lim Beng Choon J:

On 1 March 1990, the plaintiffs, the Arab-Malaysian Merchant Bank Berhad, applied by way of this originating summons for the following orders namely that:

(1) the lands held under CT Nos. 24255, 24257, 24259 and Geran No. 8501 for Lot Nos. 206, 208, 210 and 255 respectively s. 43 Bandar Kuala Lumpur Daerah Wilayah Persekutuan (the disputed lands) and charged to the plaintiffs by the defendant under the Wilayah Persekutuan Register of Charges Presentation No. 5739/83 Jilid 300 Folio 160 and Presentation No. 9987/85 Jilid 389 Folio 22 be sold by public auction under the National Land Code to satisfy the following sums due to the plaintiffs as at the 26 June 1989 -

(a) Principal	-	RM6,000,000.00
(b) Interest on out-standing from 27 March 1985 to 27 December 1985	-	RM 534,546.27
(c) Interest on amounts overdue from 1 April 1989 to 26 June 1989	-	RM2,050,236.31
		RM8,584,782.58

Breakdown of the interest amount of RM534,546.27 is as follows:

(i) Interest due on RM6.0 million @ 15.5% per annum from 27 March 1985 to 27 June 1985 (92 days)	-	RM234,410.96	
Less: Payment received on 31 March 1987	-	RM166,138.66	
		-	RM 68,272.30

(ii) Interest due on RM6.0 million @ 15.5% per annum from 27 June 1985 to 27 September 1985 (92 days)	-	RM234,410.96
(iii) Interest due on RM6.0 million @ 15.5% per annum from 27 September 1985 to 27 December 1985 (91 days)	-	RM231,863.01
		RM534,546.27

From 27 June 1989, further interest on RM6,534,546.27 at 14% per annum (or at RM2,506.40 per day) had accrued and continued to accrue until the date of realisation;

(2) the date of the auction sale to be fixed;

(3) the reserve price and other directions relating to the sale be fixed by the Senior Assistant Registrar;

(4) the defendant to pay the cost of the application as taxed by the proper officer of the Court.

The application of the plaintiffs was supported by an affidavit affirmed by their senior manager in the banking department of the plaintiffs on 1 March 1990 (Encl. 2) in which the deponent averred *inter alia* that the defendant was the registered proprietor of the disputed lands. On 3 July 1985, the defendant executed a memorandum of charge (the said charge) in respect of the disputed lands in favour of the plaintiffs as security for the sum of ringgit six million (the loan) advanced by the plaintiffs to one Dato'' Yap Yong Seong of No. 5 Lorong Ampang Ulu Tiga, Off Ampang Kiri, Kuala Lumpur (the borrower) pursuant to a loan agreement of 24 December 1984 and a subsequent supplemental loan agreement of 18 February 1986 (the agreements) entered into between the plaintiffs and the borrower (copies of the said charge, loan agreement and supplemental loan agreement were annexed to the Enclosure 2 marked as Exhibits "A", "B" and "C" respectively). The said charge over the disputed lands was duly registered on 6 July 1985 in the register of charges *vide* presentation No. 9987/85 Jilid 389 Folio 22. By the said charge the defendant was to repay on demand the loan, interest thereon and all other monies which on the accounts of the borrower were due and owing to the plaintiffs in accordance with the terms thereof.

The borrower defaulted in the repayment of the loan and following the said default, the plaintiffs through their solicitors, caused a letter of demand dated 19 July 1989 to be issued to the defendant demanding payment within seven days from the date of the receipt thereof the whole outstanding balance on the said charge which as at 26 June 1989 showed a debit balance of RM8,584,782.58 details of which were set out.

From 27 June 1989 onward further interest at 14% per annum on the debit balance had accrued and continued to accrue to date of full and final settlement. A copy of the said letter of demand was annexed to Encl. 2 and marked as Exhibit D. The defendant had failed and/or neglected to comply with the said letter of demand and thereby he was in breach of the terms and conditions of the said charge. The said breach having continued for a period of

seven days, the plaintiffs through their solicitors caused a notice under Form 16D of the National Land Code dated 4 October 1989 to be issued to the defendant requiring it to remedy the said breach within a period of seven days from the date of service thereof. A copy of the said notice was annexed to Encl. 2 and marked as Exhibit 'E'. The defendant had failed and/or neglected to comply with the said notice.

In response to the plaintiffs' allegation as set out above, the defendant through its secretary affirmed an affidavit on 31 July 1990 (Encl. 6) in which it was stated *inter alia* that by a written agreement dated 12 February 1982 between Alfonso T. Yuchengco, Eng Liat Kiang, Loo Soo Chuan, Eng Holdings Sdn. Bhd., Trans-Pacific Investment Corpn. Ltd. (the vendors) and Dato' Yap Yong Seong, the said Dato' Yap agreed to purchase all the issued share capital of the defendant from the Vendors. By another written agreement dated 16 April 1982 between Lim Siew Lay, Lim Siew Lian, Mindels Sdn. Bhd. and Lim Siew Lian Holdings Sdn. Bhd. (the vendors) and Dato' Yap Yong Seong, the said Dato' Yap agreed to purchase the shares of Laylian Realty Sdn. Bhd. By two separate letters both dated 7 September 1982 the plaintiff in reply to Dato' Yap's application for a loan, agreed to the grant of the loan in the total sum of RM22,577,980 which was to be disbursed in two separate sums amounting to RM12,150,000 and RM10,427,980 (hereinafter referred to as "the said foreign currency term loan") subject to the terms as set out in the respective letters of offer which were produced and marked as Exhibit "RL3" and "RL4" annexed to the said affidavit. The sum of RM12,150,000 was to be secured by a charge on property belonging to Laylian Realty Sdn. Bhd., known as Lots 209 and 211, Section 43, Mukim and District of Kuala Lumpur. The charge was subsequently executed by Laylian Realty Sdn. Bhd. and the plaintiff (see Exhibit "RL5" annexed to the said affidavit). The purpose for which the said foreign currency term loan were required were stated in the respective letters of offer namely:

(i) the foreign currency term loan for RM12,150,000 was to enable Dato' Yap to complete the purchase of the entire issued and paid-up share capital of the defendant and

(i) the foreign currency term loan for RM10,427,980 was to enable Dato' Yap to complete the purchase of the entire issued and paid-up share capital of the Laylian Realty Sdn. Bhd.

Thereafter by a written loan agreement dated 24 December 1984, the plaintiffs agreed to grant Dato' Yap a term loan in the sum of RM6,000,000 (hereinafter referred to as "the said Ringgit term loan"). At first there was no provision for any security in respect of the said Ringgit term loan until 18 February 1986 when the supplemental loan agreement (hereinafter referred to as "the supplemental loan agreement") was entered into between the parties. By the supplemental loan agreement, it was agreed that the security for the said Ringgit term loan was to be a second legal charge over all those properties known as Lots 206, 208, 210 and 235, Section 43 Mukim and District of Kuala Lumpur belonging to the defendant and all those properties known as Lots 209 and 211, Section 43 Mukim and District of Kuala Lumpur belonging to Laylian Realty Sdn. Bhd., as set out in the said supplemental loan agreement. The 2nd legal charge was subsequently executed in favour of the plaintiffs (see Exh. "RL6", "RL7" and "RL8" annexed to the said affidavit for copies of the loan agreement, the said supplemental loan agreement and the charge documents respectively).

On 31 March 1987, the plaintiffs received RM33,250,000 as partial settlement of Dato' Yap's loan facilities with the plaintiffs which was duly acknowledged by the plaintiffs by a letter dated 11 April 1987. There ensued further correspondence between the plaintiffs and Dato' Yap which evidenced the fact that the loans were in respect of a single account (see Exh. "RL10" annexed to the said affidavit). The plaintiffs by their actions were said to have led

the defendant to believe and the defendant did so believe that the loan facilities granted to Dato' Yap were in respect of one account and as such it was alleged that the plaintiffs were estopped from denying the existence of the one single loan account. It was also alleged that the said foreign currency loan was in contravention of s. 67 of the Companies Act 1965, as it amounted to the defendant and Laylian Realty Sdn. Bhd., dealing in their own shares which in effect amounted to a reduction in the share capital of both the companies.

Likewise the 1st legal charge created in respect of the said foreign currency term loan were sham unlawful and/or illegal as in truth and in fact the plaintiffs knew or ought to have known that the monies disbursed by them in respect of the said foreign currency term loan were to be wholly utilised for the purchase of the shares in the defendant and Laylian Realty Sdn. Bhd. and hence it was a scheme designed to evade and avoid the application of the said s. 67 to the said foreign currency term loan transaction. Furthermore at the time the charges were created in respect of the said foreign currency term loan, there was no consent obtained from the defendant and/or Laylian Realty Sdn. Bhd., at the general meeting. Hence the transaction was in contravention of s. 132C of the Companies Act 1965. Since the said foreign currency term loan was in contravention of s. 67 and/or s. 132C of the Companies Act 1965, it must follow that the single loan account which included the Ringgit term loan was voidable and therefore was illegal and/or unenforceable.

The deponent went on to aver that if this Court was to find that the said Ringgit term loan was a lawful transaction then it was contended that the payment in the sum of RM33,250,000 (as referred to earlier) which was made towards partial settlement of the single loan amount should be appropriated towards the settlement of only such sum as was lawfully due and owing to the plaintiffs (being the sum claimed by the plaintiffs) and that any balance due, rightfully belonged to Cindee Development Sdn. Bhd., the beneficial owner of the funds. As such the Ringgit term loan by the plaintiffs to the defendant had been fully settled. As regard to the 2nd legal charge, it amounted to a disposal of a substantial portion of the defendant's undertaking and required the consent of the defendant in general meeting as it affected materially the performance and financial position of the defendant. No such consent was obtained from the defendant in general meeting and there was therefore a contravention of s. 132C of the Companies Act 1965.

Finally it was alleged that the plaintiffs had initiated foreclosure proceedings with regard to the lands charged as security for the said Ringgit term loan vide Kuala Lumpur High Court Originating Summons No. S6-24-345 of 1990 and the present action. Txe plaintiffs had also initiated an action against Dato' Yap for the full amount (*vide* Kuala Lumpur High Court D2-22-2132-89). It was then contended that it would be inequitable in all the circumstances of the case to allow the plaintiffs to proceed with their action against Dato' Yap simultaneously with the present "foreclosure" action and also "to foreclose" the lands charged by Laylian Realty Sdn. Bhd., as security.

To rebut the allegations as contained in the aforementioned affidavit of the defendant company's secretary, the plaintiffs through their senior manager in the banking department affirmed an affidavit in reply (Encl. 8) on 22 September 1990 in which it was *inter alia* contended that the matters raised in the affidavit of the plaintiffs company's secretary were totally extraneous, and irrelevant to the matter at hand. The application of the plaintiffs should be considered squarely on the construction of the following documents:

(a) the memorandum of charge of 3 July 1985 which evidenced the charge of the said lands in question in favour of the plaintiffs as security for the loan sum of RM6.0 million extended by the plaintiffs to one Dato' Yap Yong Seong, the borrower;

(b) the loan agreement of 24 December 1984 setting out the terms and conditions of the loan given by the plaintiffs to the said Dato' Yap Yong Seong; and

(c) the supplemental loan agreement of 18 February 1986, incorporating certain variations of the repayment of the loan with express stipulations that subject only to the variations and notifications set out therein, all the conditions, covenants and provisions powers and terms contained in the loan agreement of 24 December 1984 were to continue to be applicable as provided in Clause 3.01 of the said supplemental loan agreement.

The plaintiffs then submitted that the true position was as follows:

(a) that the defendant had caused to be charged in favour of the plaintiffs by way of security, the said lands in consideration of the plaintiffs granting the loan to the said Dato' Yap Yong Seong;

(b) that there was a default by the defendant following the notice given pursuant to the charge and the provisions of the National Land Code 1965; and

(c) that the plaintiffs had every right in law and under the charge to come to this Court to obtain an order for sale.

It was then alleged that in any event the defendant's attempt to challenge the validity and legality of the charge as at this point of time was but an attempt in vain for if the defendant was convinced that the charge was bad, there was no reason why the defendant could not have come to Court at a much earlier point of time to seek an order to cancel the charge. The defendant's object in raising the issue of validity and legality of the charge as at this point of time, was simply to obstruct the plaintiffs' right to proceed to enforce the charge which, so the plaintiffs alleged, was a total abuse of the process of this Court. The plaintiffs then produced and marked as Exhibit 'A' annexed to the affidavit of the said senior manager of the banking department of the plaintiffs affirmed on 7 February 1991 (Encl. 9) a statement of account of the defendant's account as at 7 March 1991 showing the following particulars:

Principal	-	RM 6,000,000.00
Interest	-	534,546.27
Interest on amount overdue	-	3,601,698.72
		RM10,136,244.99

Note: Interest on RM6,534,546.27 overdue shall continue to accrue at 14% per annum with effect from 8 March 1991 till date of full realisation. (Presently accruing at RM2,506.40 per day).

The company secretary of the defendant then affirmed a second affidavit on 13 March 1991 which was duly filed (Encl. 12) and in which it was *inter alia* averred that Dato' Yap was the director of Laylian Realty Sdn. Bhd., from 7 February 1983 to 23 December 1983 and that it was this Dato' Yap who executed the charge instrument and the annexure for both the said Laylian and the defendant (see Exh. "RL5" annexed to Encl. 6). At all material times the plaintiffs knew or had the means of knowledge that the said Dato' Yap was a director of both the defendant and Laylian Realty Sdn. Bhd.

The defendant thereafter applied by way of summons in chambers dated 26 March 1991 (Encl. 14) for the following orders:

(1) that pursuant to O. 28 r. 8 of the Rules of the High Court 1980 the present proceedings be continued as if this action had been commenced by writ of summons and:

(a) the affidavits of the senior manager of the banking department of the plaintiffs dated 1 March 1990, 21 July 1990, 6 September 1990 and 7 February 1991 should stand as statement of claim and that the affidavits of the company secretary of the defendant dated 31 July 1990 and 14 March 1991 should stand as the defence and counter-claim, the affidavit of the said senior manager of the plaintiffs dated 22 September 1990 (Encl. 8) should stand as the reply and defence to counter-claim; or

(b) alternatively, that the plaintiffs should serve on the defendant within 30 days from the date of the order to be made, their statement of claim and that the defendant should plead to the plaintiffs' statement of claim within 14 days after service upon it of the plaintiffs' statement of claim and that the plaintiffs should deliver a reply to the defendant's pleading within 14 days after service upon it of such pleading;

(2) Alternatively, that the defendant be granted leave to cross examine the senior manager of the banking department of the plaintiffs on his affidavit dated 21 July 1990, 6 September 1990, 22 September 1990 and 7 February 1991.

This application of the defendant was supported by an affidavit affirmed by its company secretary on 22 March 1991 (Encl. 13). I need not set out the averments made by the deponent in his affidavit as these averments are in the main the same as the allegations which had been raised in the earlier two affidavits of the deponent (Encl. 6 and 12 respectively) and I propose only to set out the following new averment: "The issue that arise in these proceedings involve questions of fact that cannot be tried on affidavit evidence but would require *viva voce* testimony tested by cross-examination. The evidence will include oral evidence of persons who have not sworn any affidavits in these proceedings such as the directors of Laylian at the material time."

In responding to the application of the defendant the plaintiffs through their senior manager banking department filed in two more affidavits both affirmed on 12 September 1991 (Encl. 20 and 21 respectively). I do not propose to set out the several allegations made in these 2 affidavits except to mention some new allegations contained therein which had not been raised by the plaintiffs in the earlier affidavits. These may be briefly stated thus:

(1) The initial application before this Court of the plaintiffs (see Encl. 1) was a simple and straight forward application pursuant to the National Land Code seeking an order for the sale of the properties which were the subject matter of a charge under the said National Land Code dated 3 February 1985 (see Exh. 'A' to Encl. 1). But it was clear that what the defendant was trying to do was to try to unilaterally alter, modify or vary the said charge or to ask the Court to rewrite the terms of the said charge.

(2) The defendant's summons in chambers was aimed at trying to convert the matter into a trial with the ensuing delay. There could be no useful purpose served by cross-examination of anyone because at the end of the day the Court would have to construe the plaintiff's application for an order for sale on the said charge.

(3) The loans with which the shares in Laylian Realty Sdn. Bhd. and City Properties Sdn. Bhd., were pledged had both been settled in full and were not the subject matter of the application herein.

(4) The defendant's reliance in s. 132C of the Companies Act 1965 is irrelevant as that section only came into effect on the 1st February 1987 and accordingly had no bearing on the facts at hand. Likewise, reliance on s. 133 of the said Act was also misplaced as this section had no application to private exempt companies.

Now to the law. First of all it is to be noted that the plaintiffs are exercising their right as chargee of the disputed lands pursuant to s. 256(2) and (3) of the National Land Code 1965 and the Court is encumbered to order the sale of the lands to which the charge relates unless

it is satisfied of the existence of cause to the contrary (see *Kheng Soon Finance Bhd. v. M.K. Retnam Holdings Sdn. Bhd. & Ors.* [1983] 2 MLJ 384 In the second place I must bear in mind the useful observation of Lord Diplock in *Eng Mee Yong & Ors. v. V.Letchumanam* [1979] 2 MLJ 212. That although in the normal way it is not appropriate for a Judge to resolve conflicts of evidence on affidavit, this does not mean that he is bound to accept uncritically every statement on affidavit however unequivocally or improbable it may be. Then we have the case of *Wickman Tools v. Schuler AG* [1974] AC 235 which laid down the rule governing the admissibility contract. The rule is stated in the following passage of the judgment appearing in p. 261 of the reported case:

> The general rule is that extrinsic evidence is not admissible for the construction of a written contract; the parties' intentions must be ascertained, on legal principles of construction, from the words they have used.

The general rule laid down in the *Wickman Tool's* case has been cited with approval by our Supreme Court in *Faber Merlin (M) Sdn. Bhd. & Ors. v. Lye Thai Sang & Anor.* [1975] 2 MLJ 380. The Supreme Court uses that general rule to define the scope of s. 92 of the Evidence Act 1950. The scope of ss. 91 and 92 of our Evidence Act 1950, has also been dealt with in greater depth by my brethren Edgar Joseph Jr. J (as he then was) in *United Malayan Banking Corp. Bhd. v. Tan Lian Keng & Ors.* [1990] 1 MLJ 280 and in the final analysis the learned trial Judge then proceeds to state the following words as a caution - see p. 281:

> I hasten to add that from time to time the attempt is made to adduce evidence of negotiations on the ground that it is part of 'the matrix of fact.' The temptation to do so ought to be resisted.

and at p. 282 the learned Judge goes on to say:

> In the present case, the contract of guarantee and indemnity contains no ambiguity. Indeed, its provisions are clear and comprehensive. To revert to the specific issue before me, it is my opinion that the effect of admitting extrinsic evidence of the 'understanding' would be to vary or to contradict the terms of the guarantee and indemnity and this would fall foul of the provisions of ss. 91 and 92.

Bearing in mind the aforesaid legal principles I shall now proceed to consider the merits of the present case. I shall first of all examine the charge instruments comprising the statutory instrument in Form 16A and the charge annexure (the annexure) appearing in Exhibit A annexed to the affidavit of the senior manager in the banking department of the plaintiffs affirmed on 1 March 1990 (Court Encl. 2). By the Form 16A the defendant clearly declared that it being the registered proprietor of the disputed lands agreed to charge them as security in respect of the loan of RM6,000,000 given to Dato' Yap Yong Seong by the plaintiffs and the said Form 16A was duly executed by the duly authorised pengarah and setiausaha of the defendant company on 3 July 1985. The said Form 16A was also duly stamped by the defendant company's authorised chop. I turn now to the annexure. I have taken note of all the sections as set out in the annexure particularly the following crucial sections:

(a) Section 1.02:

> At **the request of the chargor, AMMB has agreed to grant to Dato' Yap Yong Seong @ Yap Eng Ching** ... **a loan facility totalling** Six Million **(RM6,000,000)** only... **upon the terms and subject to the conditions set out in a loan agreement dated 24 December 1984** ... made between the borrower and AMMB.
>
> (Emphasis supplied)

(It is also to be noted that the abbreviation AMMB means the plaintiff bank).

(b) Section 1.03:

Pursuant to the Provisions of the Loan Agreement:

(a) the Chargor is executing **this Charge over the said lands** and

(b) Laylian Realty Sdn. Bhd **executing a charge over the LRSB Lands** in favour of **AMMB as security for the Loan.**

(Emphasis supplied).

(c) Section 3.01(a):

The chargor will **on demand** pay to AMMB the Loan, interest thereon and all other money and liabilities owing or payable **under the terms of the Loan Agreement and this charge** PROVIDED THAT no such demand for payment shall be made by AMMB **unless**:

(a) **in accordance** with the provisions of the Loan Agreement, the Loan and all other sums payable thereunder by the borrower shall **become forthwith due** and payable.

(Emphasis supplied).

(d) Section 4.02(b):

(b) this Charge shall be **without prejudice to any security already given by the Chargor and/or the borrower to AMMB** or any security which may hereinafter be given to AMMB ...

(Emphasis supplied).

(e) Section 9.01:

provides that no act, delay, omission or default on the part of the plaintiffs shall impair any right, power, privilege or remedy accruing to the plaintiffs nor shall as a waiver or any acqniescence on the part of the plaintiffs. Neither could the said charge nor any provisions thereof be amended, changed, modified, varied, waived, discharged or terminated orally but only by a written statement signed by the party or parties.

(f) The following part of s. 9.02 which reads:

... and it is expressly declared that no **change of any sort whatsoever** in relation to or affecting the Chargor **shall in any way affect** the security liabilities and or obligations created hereunder or **in relation to any transaction whatsoever whether past present or** future.

(Emphasis supplied).

(g) Section 10.02:

It is HEREBY AGREED AND DECLARED that this charge, the loan agreement and the second legal charge executed by Laylian Realty Sdn. Bhd., over the LRSB Lands are instruments employed in one transaction to secure the sum of Malaysian Ringgit Six Million (RM6,000,000) and interest thereon within the meaning of s. 4(3) of the Stamp Ordinance 1949 ...

A careful reading of the annexure shows that the following facts cannot be disputed.

(1) The annexure was properly executed by the authorised director and the company secretary of the defendant company and was properly stamped by the said company chop;

(2) The charge was made over the disputed lands as well as lands of which Laylian Realty Sdn. Bhd., is the registered proprietor in favour of the plaintiffs bank as security for the loan of RM6 million given to the borrower, Dato' Yap Yong Seong;

(3) The loan granted to Dato' Yap Yong Seong was made upon the terms and subject only to the conditions set out in a loan agreement dated 24 December 1984 (the 1984 loan agreement) made between the borrower and the plaintiffs and a demand of repayment could only be made pursuant to the terms and conditions of the 1984 loan agreement;

(4) Except for the restriction specifically expressed in the annexure the plaintiffs could not be held to be in any way accountable for any security already given by the defendant and/or the borrower to the former;

(5) The right, power, privilege or remedy accruing to the plaintiffs could not be curtailed by any act, delay, omission or default on the part of the plaintiffs or in any other way;

(6) the security liabilities and obligations of the defendant would not be affected by any part payment of the loan under the charge or by any other means.

From the above findings I have no doubt at all that the obligations and liabilities as well as the rights, powers, privileges and remedies of the respective parties to the charge have been clearly spelt out in the annexure. There is no ambiguity or uncertainty whatsoever in the annexure. Indeed its provisions are crystal clear and comprehensive. There is no room for importing extrinsic evidence to construe the meaning of the provisions of the annexure or to unravel the intention of the respective parties to the annexure.

I shall now consider the provisions of the 1984 loan agreement entered into by Dato' Yap Yong Seong and the plaintiffs (see Exhibit B annexed to Court Encl. 2). Now it is clearly and unequivocally stated in s. 1.01 thereof that the loan of RM6 million granted to Dato' Yap Yong Seong was to be utilized by the said Dato' Yap "as subscription monies for new shares in Saya Holdings Sdn. Bhd." so as to provide additional working capital for Saya Holdings Sdn. Bhd. (SHSB). The purpose of granting the loan to the said Dato' Yap is confirmed by s. 10.01 thereof whereby the said Dato' Yap gave an undertaking to *inter alia* "ensure that SHSB carry out and operate its business and affairs with due diligence" etc. and to ensure that "SHSB maintain in full force and effect all relevant licences" etc. Again there is the same provision to prohibit any curtailment of the right, power, privilege or remedy accruing to the plaintiffs by any waiver acquiescence and any default on their part (see s. 14.01).

Finally there is the supplemental loan agreement executed between Dato' Yap Yong Seong and the plaintiffs Bank on 18 February 1986 "the 1986 supplemental loan agreement" (see Exhibit "C" annexed to Court Encl. 2). Sections 1.01 and 1.02 reiterated that as security for the loan of RM6 million granted to Dato' Yap Yong Seong, he had caused the defendant to charge the disputed lands, as second legal charge, to the plaintiffs. Likewise the said Dato' Yap caused Laylian Sdn. Bhd., to charge its lands as second legal charge to the plaintiffs as security for the said loan. Section 2.01 varied the 1984 loan agreement by allowing the said Dato' Yap to repay the principal amount in one lump sum on 28 February 1986; otherwise all the provisions of the 1984 loan agreement would continue to have effect and application.

Again upon a careful scrutiny of the provisions of the 1984 loan agreement and the supplemental loan agreement, I am more than sufficiently satisfied that had there been any doubt from the provisions of the statutory instrument Form 16A and the annexure concerning the purpose of the granting of the Ringgit term loan of RM6 million to Dato' Yap, this would have been unequivocally dispelled by a close reading of the provisions of the 1984 loan agreement, for it is clearly stated in the provisions of the document that the purpose of granting the Ringgit term loan was to enable Dato' Yap to purchase the new shares in SHSB so as to provide working capital for this company. It is therefore indisputable that the Ringgit term loan transaction was an independent and separate loan transaction granted to Dato' Yap governed only by the provisions of the instruments creating the charge only and by

the relevant loan agreements. I agree with the allegations of the plaintiffs that "the defendant is simply trying to confuse the issue by bringing in irrelevant matters" in that the defendant is trying to connect the Ringgit term loan transaction with the foreign currency term loan transaction when from the evidence it knew or ought to have known that this transaction had nothing whatsoever to do with the foreign currency term loan transaction apart from the fact that the two loans were given to the same Dato' Yap. To my mind it is an exercise of futility - A last ditch battle to alter the unalterable documentary evidence. That being the case the question of the cause or matter of the plaintiff should have been commenced by a writ action has no application. The defendant's reliance on O. 28 r. 8 of the Rules of the High Court 1980 is therefore highly misconceived.

As to the alternative prayer of the defendant for leave to cross-examine the assistant general manager of the banking department of the plaintiffs who deposed all the four affidavits dated 21 July 1990, 6 September 1990, 22 September 1990 and 7 February 1991 in support of the plaintiffs' case, I was at one stage inclined to allow leave for the defendant to do so. However upon a study of the case law I am more inclined to adopt the principle that cross-examination on an affidavit will not generally be allowed on matters extraneous to the question in the particular proceedings in which the affidavit was filed - see *Re SBA Properties Ltd.* [1967] 1 WLR 799. There is no doubt in my mind that this is a sound principle so as to prevent an opponent from bringing irrelevant matters. Indeed in the circumstances of this case I am thoroughly convinced that should I accede to the request of the defendant to cross examine the said deponent I would be paving the way for the defendant to embark on a venture of fishing for evidence regardless of their relevancy or otherwise!

Finally it is to be noted that the first letter of demand dated 19 July 1989 was duly served on the defendant (see Exhibit 'D' annexed to Encl. 2) which was followed by a statutory notice of default Form 16D dated 4 October 1989 which was also duly served on the defendant (see Exhibit "E" annexed to Encl. 2). If the defendant was really convinced that the charge was illegal, one would have expected it to protest vehemently if not upon receipt of the first letter of demand at least soon after the receipt of the same. This it had not done and rather chose to remain silent until it was no doubt urged by the ingenuity of its legal advisers to raise the issue of illegality a year later so as to create doubt and confusion over the perfectly good cause and matter relied by plaintiffs in the present action. Under the circumstances I am justified in questioning the *bona fide* of the defendant.

For the reasons as stated above I must therefore dismiss the defendant's application made by way of summons-in-chambers dated 26 March 1991 Encl. 14. The application of the plaintiffs made by way of this originating summons will be heard on a date to be fixed by the SAR.

Also found at [1992] 4 CLJ 2123